

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

**KARL A. MILLER and
MARTINA MILLER**

Plaintiffs,

COMPLAINT

vs.

CIVIL CASE #

UNITED STATES OF AMERICA

Defendant.

The Plaintiffs, KARL A. MILLER and MARTINA MILLER, by their Attorneys, RICHARD P. VALENTINE, ESQ., P.C., in association with WALTER A. OLENIEWSKI, ESQ., as and for their causes of action against the Defendant, allege, upon information and belief, as follows:

1. At all times hereinafter mentioned, the Plaintiffs, KARL A. MILLER and MARTINA MILLER, were citizens of the United States, residing and domiciled in the County of Erie and the State of New York.

2. The Court has jurisdiction by reason of Section 1346 of Title 28 of the United States Code, and Chapter 171 of Title 28 of the United States Code known as the Federal Tort Claim Act.

3. Pursuant to, and in compliance with, the statutes and regulations made and provided, including 28 U.S.C. §2401 (b), the Plaintiffs did file their claims on or about July 23,

2009 which were acknowledged received on August 11, 2009, within two (2) years of the occurrence of the events hereinafter mentioned with the appropriate federal agency, the DEPARTMENT OF VETERANS AFFAIRS, and the Plaintiff does commence this action within six (6) months of the deemed denial of those claims by the same federal agency.

4. This Court is the appropriate venue for this action as, pursuant to 28 U.S.C. §1391 (b) (2), this is the District where the negligent conduct occurred.

5. The Defendant, UNITED STATES OF AMERICA, is a corporation sovereign; that, through its agents, servants, and employees and through the DEPARTMENT OF VETERANS AFFAIRS, a federal agency, at all times hereinafter mentioned did and does operate a hospital, commonly known as Veterans Administration Medical Center, located at 3495 Bailey Avenue in the City of Buffalo, County of Erie and State of New York.

6. The Plaintiff, KARL A. MILLER, in the period from April 13, 2006 through February 12, 2013, underwent a continuous course of treatment at the aforementioned Veterans Administration Medical Center in Buffalo, for chronic left foot pain. This course of treatment, on July 27, 2007, included surgery in the nature of a Lapidus fusion with external fixation, performed by BHASKAR BHATTACHARYYA, D.P.M., an attending Podiatrist and employee acting within the scope of his employment at that Veterans Administration facility. Thereafter, the Plaintiff, continued to treat for multiple complications arising from that surgery, and, for disabilities resulting from those complications.

**AS AND FOR A FIRST, SEPARATE AND DISTINCT CAUSE OF
ACTION AGAINST THE DEFENDANT, UNITED STATES OF
AMERICA, THE PLAINTIFFS ALLEGE AS FOLLOWS:**

7. Repeat and reallege each and every allegation contained in paragraphs

numbered "1" through and including "6" hereof with the same force and effect as if hereinagain fully set forth.

8. On or about April 13, 2006, the Plaintiff, KARL A. MILLER, engaged the Defendant, UNITED STATES OF AMERICA, to care for him, and to treat him professionally for complaints of persistent pain in his left foot, aggravated by prolonged walking associated with his employment as a letter carrier for the United States Postal Service.

9. In the period from April 13, 2006, through and including February 12, 2013, the Defendant, UNITED STATES OF AMERICA, undertook the duty of continuously rendering professional podiatric medical care and treatment to the Plaintiff, KARL A. MILLER.

10. The Defendant, UNITED STATES OF AMERICA, in undertaking the professional podiatric medical care and treatment of the Plaintiff, KARL A. MILLER, as aforesaid, was negligent and committed acts of malpractice in failing to use reasonable care and take reasonable precautions in the care and exercise of its skill, and in the application of its learning, in that the Defendant, UNITED STATES OF AMERICA, through its agents, servants, and employees at the Veterans Administration Medical Center in Buffalo, including DR. BHASKAR BHATTACHARYYA, failed to appropriately examine; to perform or to order appropriate testing; to diagnose; or, to render appropriate treatment to the Plaintiff, and/or, failed to appropriately refer the Plaintiff to other professionals for appropriate diagnosis and treatment. More particularly, in this case, The Defendant, UNITED STATES OF AMERICA, through its agent, ostensible agent, servant and/or employee, DR. BHASKAR BHATTACHARYYA:

- failed to elicit an accurate and comprehensive medical history;
- failed to perform appropriate examinations necessary to assess this patient's true condition before recommending surgery;
- failed to obtain appropriate x-ray studies to properly assess a suspected bunion

- deformity;
- failed to make a timely and appropriate differential diagnosis;
- erroneously diagnosed Hallux Valgus (i.e. a bunion deformity) as the cause of the patient's presenting complaints;
- devised an inappropriate surgical plan for treatment of this patient's condition;
- recommended a Lapidus procedure on July 27, 2007 for correction of a bunion deformity when there were insufficient indications to warrant it;
- recommended a Lapidus procedure on July 27, 2007 for correction of a bunion deformity when this patient had contraindications for such a procedure;
- in performing surgery on July 27, 2007, excessively shortened the patient's first metatarsal;
- in managing the patient's post-operative care, failed to achieve, and. to confirm by x-ray examination adequate bone healing before removing external fixator;
- failed to take proper cognizance of the patient's post-operative signs, symptoms and complaints indicating probable poor union;
- failed to conduct timely and appropriate x-ray evaluations in the period from November, 2007 through April, 2008 despite persistent patient complaints;
- failed to diagnose and treat the patient's poor healing in a timely manner to prevent progression to non-union.

11. As a direct result of the carelessness, negligence and unskillfulness of the Defendant, UNITED STATES OF AMERICA, in treating and caring for the Plaintiff, KARL A. MILLER, and without any fault or negligence of the Plaintiffs contributing thereto, the said KARL A. MILLER was caused to suffer serious physical injuries, and was subjected to a protracted period of conscious physical pain and suffering, and, was caused to expend large sums of money for uninsured medical care and attention, all to his damage in the amounts of economic losses amounting to One Million One Hundred Eighty Seven Thousand (\$1,187,00.00) Dollars, and, non-economic damages of Four Hundred Thousand (\$400,000.00) Dollars.

**AS AND FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF
ACTION AGAINST THE DEFENDANT, UNITED STATES OF AMERICA,
THE PLAINTIFFS ALLEGE AS FOLLOWS:**

12. Repeats and reallege each and every allegation contained in Paragraphs numbered "1" through and including "11" hereof with the same force and effect as if hereinagain

fully set forth.

13. The Defendant, UNITED STATES OF AMERICA, through its agent, ostensible agent, servant and/or employee, DR. BHASKAR BHATTACHARYYA, in undertaking the medical and surgical care and treatment of the Plaintiff, KARL A. MILLER, in the period from April 13, 2006 through February 12, 2013, was negligent and committed acts of malpractice by failing to use reasonable care and take reasonable precautions in the care and exercise of his skill and in the application of his learning in that he performed surgery on the Plaintiff, KARL A. MILLER, on July 27, 2007, without first having obtained from the Plaintiff, KARL A. MILLER, an informed consent.

14. A reasonably prudent person in the Plaintiff's position would not have undergone the proposed surgery of July 27, 2007 had he been fully informed of the risks, benefits, and alternatives to the proposed surgical procedures.

15. As a direct result of the carelessness, negligence and unskillfulness of the Defendant, UNITED STATES OF AMERICA, through its agent, ostensible agent, servant and/or employee, DR. BHASKAR BHATTACHARYYA, in treating and caring for the Plaintiff, KARL A. MILLER, and without any fault or negligence of the Plaintiffs contributing thereto, the said, KARL A. MILLER was caused to suffer serious physical injuries, was subjected to a protracted period of conscious physical pain and suffering, and, was caused to expend large sums of money for uninsured medical care and attention, all to his damage in the amounts of economic losses amounting to One Million One Hundred Eighty Seven Thousand and 00/100 (\$1,187,00.00) Dollars, and, non-economic damages of Four Hundred Thousand and 00/100 (\$400,000.00) Dollars.

**AS AND FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF
ACTION AGAINST THE DEFENDANT, UNITED STATES OF AMERICA,
THE PLAINTIFFS ALLEGE AS FOLLOWS:**

16. Repeat and reallege each and every allegation contained in Paragraphs numbered "1" through and including "14", hereof, with the same force and effect as if hereinagain fully set forth.

17. At all times herein mentioned, the Plaintiffs, KARL A. MILLER and MARTINA MILLER, were, and still are, husband and wife.

18. As a direct result of the careless, negligence and unskillfulness of the Defendant, and as a result of the physical injuries to the Plaintiff, KARL A. MILLER, caused thereby, the Plaintiff, MARTINA MILLER, has been deprived of the love, care, services, and society of her husband, and has been, and will in the future be, obliged to incur medical expenses in conjunction with her husband's injuries, all to her damage in the amount of Three Hundred Thousand and 00/100 (\$300,000.00) Dollars.

WHEREFORE, the Plaintiff respectfully demands Judgment against the Defendant on the First and Second Causes of Action, in the amount of One Million Five Hundred Eighty-Seven Thousand and 00/100 (\$1,587,000.00) Dollars, respectively, and, on the Third Cause of Action in the amount of Three Hundred Thousand and 00/100 (\$300,000.00) Dollars, and requests

such other and further relief as to this Court may seem just and proper.

Dated: Buffalo, New York
October 30, 2014

RICHARD P. VALENTINE, ESQ., P.C.

BY s/Richard P. Valentine, Esq.
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CERTIFICATE OF MERIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

RICHARD P. VALENTINE, being first duly sworn, deposes and says: I am an attorney at law duly licensed to practice in the Courts of this State, and I am the attorney for the Plaintiff(s) in the within action. I have reviewed the facts and circumstances alleged in the annexed Complaint, as they relate to claims of podiatric malpractice, and have consulted with at least one licensed podiatrist who I believe is knowledgeable in the relevant issues, and I have concluded on the basis of such review and consultation that there is a reasonable basis for this action.

s/ Richard P. Valentine, Esq.
RICHARD P. VALENTINE

Sworn to before me this

30th day of October, 2014.

s/ Thersea Garvey